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No. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

TONI DECOSSAF HERNANDEZ,

Petitioner

versus

KMART CORPORATION, *et al.*,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Trial Court erred and abused its discretion when it denied petitioner's motion for leave to amend her complaint (which was originally filed in State court and removed to Federal court by the defendant corporation) to add as a defendant the non-diverse store manager and the non-diverse corporation that was the owner and/or operator of the K-Mart store in Chalmette, Louisiana, when Louisiana law had only recently been clarified to provide that a store manager could be held liable for unreasonably dangerous conditions upon store premises and federal district courts had consistently construed petitions naming store managers as defendants to be a fraudulent joinder to avoid diversity jurisdiction of the federal courts, thus denying the plaintiffs the benefit of the State forum they had selected when they initiated their claim?

2. Whether the Trial Court erred and denied petitioner a fair trial when it refused to instruct the jury according to Louisiana law that causation of an injury may be established upon the basis of proof of a plaintiff's good health before an accident and proof of injuries that could possibly have been caused by an accident of the type alleged by the plaintiff?

3. Whether the Trial Court erred in excluding the testimony of safety experts concerning the unlikelihood that a store patron would have seen the clear, small puddle of bubble bath on a mottled green flecked tile floor while shopping, and in denying petitioner's motion for alternative post-verdict relief from the jury's determination that petitioner was 25% responsible for her injuries (either upon a motion for a judgment *non obstante veredicto* or a motion for a new trial), when there was no evidence before the Trial Court upon which a valid determination of comparative fault could have been

made under Louisiana law--the substantive law the Federal District Court was bound to apply in this case arising under its diversity jurisdiction?

4. Whether the Trial Court erred in denying such post-verdict relief to Mr. Hernandez on his loss of consortium claim when he and Mrs. Hernandez testified, without contradiction, about the nature and extent of their pre-accident marital activities and the substantial differences produced by Mrs. Hernandez's injuries?

LIST OF ALL PARTIES TO THE PROCEEDING

The parties to the proceedings below were Toni Decossaf Hernandez and Sherman Hernandez, plaintiffs, and K-Mart Corporation, defendant. Plaintiff also sought to add as parties defendant two non-diverse parties, *viz.*, K-Mart #3387, Inc., a Louisiana corporation that is a subsidiary of defendant K-Mart Corporation, and John Galloway, the store manager, both of whom have an interest in the outcome of this Court's decision of this case.

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IN THE

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OCTOBER TERM, 1993

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versus

K-MART CORPORATION, *et al.*,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United

States Court of Appeals for the Fifth Circuit entered in this action on May 19, 1993.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, p. A-1 through A-8, *post*) is unreported. That unreported opinion is referenced in a "Table of Decisions Without Reported Opinions" appearing at 993 F.2d 1543 (Table). The Trial Court's Minute Entry, dated January 3, 1992 and entered on January 7, 1992, denying petitioners' motion for leave to amend their complaint to add non-diverse parties and to remand this case to the State court from which it had been removed, is unreported. It is annexed hereto as "Appendix B," p. A-9, *et seq., post.* Also unreported is the Trial Court's written Order and Reasons denying petitioners' alternative motions for post-verdict relief, which was entered in these proceedings on April 16, 1992. It is annexed hereto as "Appendix C," p. A-13, *et seq., post.*

JURISDICTION

The opinion of the Court of Appeals was entered on May 19, 1993. (Appendix A, *post*) A timely petition for rehearing was filed on June 14, 1993. On June 25, 1993, the Court below denied petitioner's petition for rehearing without considering the supplement thereto. (Appendix D, p. A-25, *post*) This petition is filed within ninety days of the date of the order denying petitioner's petition for rehearing.

The jurisdiction of this Court is invoked by petitioner pursuant to 28 U.S.C. §1254(1).

STATUTES AND RULES INVOLVED

The statutes and rules with which this case is involved are set forth in Appendix E, pp. A-26 *et seq.*, *post*. They are: 28 U.S.C. §§1332(a), 1441(a), 1447(c) and 1447(e); Rules 701 and 702, F.R.Evid.; Rule 15(a), F.R.C.P.; and La.R.S. 9:2800.6--all as construed in the

applicable jurisprudence of the United States and the State of Louisiana.

STATEMENT OF THE CASE

On July 26, 1989, Toni Hernandez was shopping in a K-Mart store[1] in Chalmette, Louisiana. In the section of the store where health and beauty aids were displayed for sale, Mrs. Hernandez was looking at merchandise. She then turned away from the shelves and started to walk down the aisle. She stepped into a small, clear puddle of Sesame Street Bubble Bath. Her foot slipped and she fell, but she was caught by her husband before she hit the floor. She twisted her back and her ankle.

The vinyl tile flooring in that section of the store was a mottled green color with green flecks in it. The color of the floor made it difficult for a customer engaged

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[1]She was shopping in K-Mart #3387 in Chalmette, Louisiana. K-Mart #3387, Inc. is a Louisiana corporate subsidiary of K-Mart Corporation. The plaintiffs are Louisiana citizens.

in shopping to see a small clear puddle of liquid on it.[2] Despite the potential hazard from such slippery substances leaking on the floor, the store did not undertake to place skid-resistant carpets, mats or other protective devices upon the floor to absorb such spilled substances. Thus, the risk of a slip and fall hazard in that area of the store was highly likely to be encountered by customers. The store did not detail personnel to keep vigilance in that area, consistent with the risks that were likely to be encountered by its patrons. Rather, the

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[2]Plaintiff listed two experts to testify before the jury with regard to the nature and extent of the hazard created by the deposit of a clear slippery substance upon the tile floor as well as the unlikelihood that such a substance would be seen by a customer who was occupied with shopping. The Trial Court excluded that evidence, contending that the jury did not need such testimony. The error of the Trial Court's ruling on the admissibility of their testimony is made a basis for this petition because the jury found Mrs. Hernandez to have been 25% responsible for the accident. The error of the exclusion of that testimony is limited to the issue of plaintiff's comparative negligence since the jury found K-Mart to have been liable to the plaintiff and 75% responsible for all of the injuries she sustained in the accident.

manager generally delegated to all employees the duty of discovering and correcting such premises hazards while they were incidentally performing their other duties near such hazards.

Ms. Camille Hebert, a K-Mart employee who witnessed Mrs. Hernandez's fall from a short distance away, did not see the liquid on the floor before Mrs. Hernandez slipped in it. When Mrs. Hernandez pointed out to Ms. Hebert the small puddle of liquid on which she had slipped, Ms. Hebert discovered even more of the spilled liquid a few feet away from the place where Mrs. Hernandez slipped. It was store policy that all of the employees were charged with the responsibility of observing such hazards when they were in the area and when such hazards were thus discovered, either to clean them up or to see that they were cleaned up before they left the area. No one was assigned to inspect the aisles regularly. No one did. Ms. Hebert's testimony that she

was in the area and did not see the substance on the floor before Mrs. Hernandez' fall shows the defectiveness of K-Mart's method of delegating to everyone the obligation of incidentally finding and correcting such hazardous conditions without undertaking task-specific, regularly scheduled inspections of the aisles for such hazards.

On the date of the accident, Mrs. Hernandez was taken to a local hospital emergency room where she was examined. She then complained of pain in her low back and left ankle. The emergency room physician ordered plain x-rays and rendered palliative treatment. He referred Mrs. Hernandez to an orthopedist for further evaluation and treatment.

Mrs. Hernandez was treated by orthopedists for approximately seven months for her low back condition, which was diagnosed as a lumbar sprain. She was treated with traction and medication for her back problem

during that period. After that problem became resolved and Mrs. Hernandez continued to complain about persistent ankle pain, Dr. McLaughlin ordered a CAT scan and bone scan of her left ankle and foot. Those examinations revealed the existence of a cyst in the posterior portion of her left talus that communicated with the subtalar joint. An x-ray taken on the date of the accident had revealed a spot that could not be definitely identified by plain x-ray techniques. That was the cyst. Thus, the cyst clearly pre-existed the accident. But Mrs. Hernandez had never had any ankle or foot symptoms before the slip at the K-Mart store. The symptoms that developed after she twisted her ankle persisted from the time of her slip at the K-Mart store until after she was operated on in February of 1990 to excise the cyst and to insert a bone graft taken from her hip.

Dr. McLaughlin testified that an accident of the type sustained by Mrs. Hernandez could change the

structures of a cyst and cause the onset of symptoms, as she had experienced in this case. He observed that the onset of symptoms at the time of her injury to her left ankle showed a causal relationship between the accident and the condition for which she required medical treatment, *viz.*, the symptoms caused by the aggravation of the cyst. Even the defendant's expert orthopedic surgeon, who was retained only to render testimony and not treatment, testified that there was a 50-50 chance that the slip and twisting of Mrs. Hernandez's ankle aggravated the cyst and made it become symptomatic, thus requiring the surgical treatment she was provided.

The parties stipulated that the medical bills incurred by Mrs. Hernandez equalled $20,916.58. Defendant K-Mart explicitly reserved its right to dispute, and it vigorously disputed, the issue of the causal relationship between the injuries and/or conditions that were treated and the slip by Mrs. Hernandez at its store. The

jury, however, awarded all of the stipulated medical expenses to Mrs. Hernandez. Thus, the jury found that all of those conditions were causally related to the accident at K-Mart.

At the Pre-Trial Conference that was conducted immediately before trial, plaintiffs' counsel advised the Trial Court of his intention to file a motion to remand this removed case to the State Court on the basis that the jurisdictional amount of $50,000, exclusive of interest and cost, was not in controversy. Plaintiff was ordered by the Trial Court to file a memorandum in support of such a motion before trial. Plaintiff's counsel, after researching the issue of remand based on the absence of jurisdictional amount, moved for remand to State court on the additional basis that plaintiffs should be granted leave to amend their petition to add two non-diverse defendants against whom plaintiffs had viable claims under Louisiana law. That amendment would have de-

stroyed complete diversity, and it would have required a remand of this case pursuant to 28 U.S.C. §1447(c and e), as then recently amended. Plaintiff filed a motion for leave to amend the petition and tendered a proposed amending petition, incorrectly using the State Court caption instead of the Federal Court caption. By Minute Entry dated January 3, 1992 and entered on January 7, 1992, the Trial Court denied plaintiffs' motion for leave to amend their original petition and to remand this cause to the State Court on the ground that plaintiffs sought to amend their suit beyond the expiration of the delays provided by the Court's Rule 16 Scheduling Order. That ruling was made despite the plaintiffs' demonstration that the decision upon which they relied to establish the viability of the State law claim against the store manager had been decided by the Louisiana Supreme Court after

the said cutoff date[3] and that other federal courts in Louisiana had declined to remand cases against store managers to the State Courts before that decision.[4] That ruling was also made despite the showing by plaintiffs that the discovery of the existence and identity of the other non-diverse defendant, a Louisiana corporation named K-Mart #3387, Inc., had occurred only

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[3]As shown by the Trial Court's ruling on petitioners' motion for leave to amend and to remand, the deadline for amending the complaint after its removal to the Federal courts was August 2, 1991. Appendix B, p. A-10, *post*. The decision which clarified Louisiana law to establish the existence of a cause of action against the store manager was not rendered until after the expiration of the amendment cutoff date. *Holmes v. Great A. & P. Tea Co.*, 587 So.2d 750 (La.App. 4 Cir. Sept. 26, 1991), *writ den.*, 592 So.2d 412 (La. Jan. 31, 1992).

[4]*See, e.g., Elder v. Wal-Mart Stores, Inc.*, 751 F.Supp. 639 (E.D.La.1990); *Freeman v. Wal-Mart Stores, Inc.*, 775 F.Supp. 208, 209 n. 1 (W.D.La.1991). In *Freeman,* Senior Judge Hunter acknowledged that he had recently refused to remand a case to State court when a claim had been made against a non-diverse store manager and that the analysis in *Holmes v. Great A & P Tea Co., supra,* caused him to change his position *vis-a-vis* the legitimacy of a claim made against a store manager which would defeat federal diversity jurisdiction.

recently and plaintiffs did not then know the full extent of that defendant's duties that would make it liable for the risks encountered by Mrs. Hernandez in the K-Mart store #3387.

During the trial, the Trial Court refused to instruct the jury, according to *Housley v. Cerise,* 579 So.2d 973 (La.1991), as follows:

> You may presume that Mrs. Hernandez's injury resulted from her slip in K-Mart if you are satisfied that before the accident she was in good health, but following the accident the symptoms of her disabling condition appeared and continuously manifested themselves afterward[,] providing that the medical evidence shows that there was a reasonable possibility of causal connection between the accident and the disabling condition.

There was evidence of the pre-existence of the cyst, but there was also evidence that the cyst was asymptomatic before the accident sued upon. There was evidence that the cyst became symptomatic concurrently with the occurrence of the twisting of Mrs. Hernandez's ankle and that it persisted until surgically corrected by the excision

of the cyst and transplantation of a bone graft from her hip into the space left by the excision of the cyst. Medical testimony showed that the accident, occurring as the plaintiff described it, could produce changes in the pre-existing cystic structure that could make the cyst become symptomatic. Dr. McLaughlin testified that the surgical treatment rendered for the cyst was made necessary because of the symptoms that were historically related to the slip and twisting of plaintiff's ankle at the K-Mart store. The objection to the denial of that requested instruction was renewed in plaintiffs' motion for post-verdict relief, based upon the contention that the denial of the requested instruction affected the jury's determination of quantum because of the circumstantial nature of the proof of causation and the absence of instructions upon the proof required to establish plaintiff's claim.

Although there was no evidence that Mrs. Hernandez saw or would likely have seen the small, clear puddle of slippery bubble bath without closely inspecting the floor, the jury held her to have been 25% responsible for the accident and her resulting injuries. Such a finding imputed to her knowledge of the existence of a hazard that she should have discovered, which is clearly contrary to Louisiana law. Plaintiffs sought to offer evidence from a safety expert that such a condition of the store was unlikely to be discovered by a customer without that person undertaking an "inspection" for that purpose. The Trial Court excluded such testimony. Accordingly, plaintiffs raised that issue in their post-verdict motion. The Trial Court denied it, basing its opinion upon its conclusion that plaintiff's contributory negligence could have been found from the admitted evidence.

Mr. and Mrs. Hernandez testified about the frequency of their sexual relations before the accident and the effect upon that aspect of their marriage that was caused by Mrs. Hernandez's pain from the injuries she sustained in the slip at K-Mart. That evidence was uncontradicted. No factual basis was recited as a potential basis for the jury's determination that Mr. Hernandez was unentitled to compensation for his loss of consortium resulting from his wife's injuries at K-Mart. The judges of the Court of Appeals, apparently drawing upon their own experiences concerning frequency of marital relations, considered that the jury could have found the uncontradicted testimony of the plaintiffs to be incredible. Mr. Hernandez testified that he and Mrs. Hernandez had sexual intercourse daily, sometimes as often as twice daily. The Court said: "Given the frequency of pre-accident sexual relations alleged by Hernandez, the jury rightly could view his claim with

some skepticism." (Appendix A, p. A7-A8, *post.*) The Court below thus affirmed the jury's denial of Mr. Hernandez's claim for loss of consortium in the face of uncontradicted evidence of such loss--a result that clearly could not have happened under Louisiana law.

BASIS FOR FEDERAL JURISDICTION

Federal jurisdiction over these proceedings was asserted by the defendants who filed a notice of removal and removed this case from the Thirty-Fourth Judicial District Court for the Parish of St. Bernard, State of Louisiana, to the United States District Court for the Eastern District of Louisiana. Petitioners sought to amend their original petition to add non-diverse parties against whom they had viable State law claims. The district court denied petitioners' motion for leave to amend their petition and to remand these proceedings to the State court from which this suit was removed. The Court did not rule on petitioners' motion to remand

based upon the absence of the required amount in controversy. The jury awarded damages to the petitioner, Toni D. Hernandez, in the following amounts:

A.	Pain and suffering	$10,000.00
B.	Past medical expenses	$20,916.58
C.	Future medical expenses	$ -0-
D.	Past loss of earnings	$ 1,000.00
E.	Loss of future earning capacity	$ -0-

That award amounted to $31,916.58. The jury, however, found Mrs. Hernandez to be comparatively negligent and assigned 25% of the fault for her injuries, damages and losses to her own negligence. The district court accordingly reduced the award to Mrs. Hernandez to $23,936.45. The jury determined that Mr. Hernandez was not entitled to any remuneration for his loss of consortium with his wife as a result of the injuries the jury found to have been proven to be causally related to Mrs. Hernandez's slip at the K-Mart store.

There is a legitimate issue whether the federal courts had jurisdiction over these proceedings upon removal of this case from the State courts. Jurisdiction was asserted and exercised by the federal courts pursuant to the removal statutes, 28 U.S.C. §1441 *et seq.*, and the federal jurisdictional statute concerning the diversity of citizenship among the parties, 28 U.S.C. §1332.

REASONS FOR GRANTING THE WRIT

Petitioners respectfully assert that there were numerous errors in these proceedings which have produced a result which is inconsistent with Louisiana substantive law governing cases of this type. This petition asserts as grounds for the exercise of this Court's extraordinary power of supervision over the lower courts only those issues we believe to merit this Court's attention. The issues presented are (1) whether the trial court abused its discretion and denied petitioners' right

to sue a proper party defendant whose citizenship would have destroyed the subject matter jurisdiction of the federal court when it refused leave to amend the petition to add such a defendant and require a remand of this removed case; (2) whether the federal trial court, in this diversity of citizenship jurisdictional case, improperly denied plaintiffs the benefit of substantive Louisiana precedent when it refused to instruct the jury upon the sufficiency of proof of causation of damages under Louisiana law, thus affecting the outcome of this trial by denying the jury guidance which would have reduced the likelihood of compromise by the jurors upon either the issue of quantum of damages or victim fault; (3) whether the trial court erred in excluding relevant expert opinion testimony which would have provided the jury with information which would have avoided a determination of partial fault of the victim; and (4) whether the trial court erred in denying Mr. Hernandez's motion for a new trial

on his claim for loss of consortium when the uncontradicted evidence permitted no conclusion other than that he had sustained such a loss.

(1) **Refusal to permit diversity-destroying amendment and remand to State court**

Plaintiffs had a right to sue in the forum of their choice, *viz.*, the Louisiana courts in which errant jury verdicts are corrected by the appellate courts under their power to review questions of law or fact. *See* Art. 5, §§5(C), 10(B), La.Const.1974. That appellate power leads to greater uniformity in the application of Louisiana law, and it also leads to greater predictability of the outcome when determining in which forum one should sue. The Seventh Amendment to the United States Constitution prevents federal appellate courts from undertaking such extensive review of jury verdicts. Thus, the petitioners' choice of the Louisiana forum was the exercise of a substantial right. *Accord International Primate Protection League v. Administrators of Tulane*

Educational Fund, 500 U.S. ____, 111 S.Ct. 1700, 1704, 114 L.Ed.2d 134, 143 (1991).

Before this case was removed to federal court, Louisiana law was not clear that a store manager could be held personally liable for unreasonably dangerous conditions upon premises of his employer under the new slip and fall law, La.R.S. 9:2800.6. In 1988, the Louisiana legislature promulgated a statute which governed slip and fall litigation upon merchants premises, providing:

> A. A merchant owes a duty to persons who use his premises to exercise reasonable care to keep his aisles, passageways, and floors in a reasonably safe condition. This duty includes a reasonable effort to keep the premises free of any hazardous conditions which reasonably might give rise to damage.
>
> B. In a suit for damages by a person who has suffered damages as a result of a hazardous condition while on the merchant's premises, the person must prove that the accident was caused by a hazardous condition. The burden of proof then shifts to the merchant to prove that he acted in a reasonably prudent manner in exercising the duty of care he owed to the person to keep the premises free of any hazardous conditions.

C. In exculpating himself from liability under this Subsection, the merchant need not introduce the testimony of every employee of the merchant or any particular proportion thereof, but is only required to introduce the testimony of any employee shown to have actually created the hazardous condition and those employees and management personnel whose job responsibilities included inspection or clean-up of the area where the accident giving rise to the damages occurred.

D. "Merchant" means one whose business is to sell goods, foods, wares, or merchandise at a fixed place of business. (Added by Acts 1988, No. 714, §1)

In the appellate court, respondent argues that no "personal" duty was owed by the employees to store patrons since La.R.S. 9:2800.6 imposed that duty only upon the merchant. Respondent argued (Appellee's Brief, p. 18):

> In addition to defining the duty owed to the premises user, this statute also provides for the burden of proof and evidentiary requirements in suits filed by customers. The duty to customers is owed only by the merchant, which in this case is Kmart. Although reference is made to employees of the merchant with respect to evidentiary requirements, nothing in the statute creates a personal duty on the part of the merchant's employees. Furthermore, defendant submits that the fact that the responsibilities of the employees are discussed only with respect to

> the evidentiary burdens of the merchant infers a specific intention on the part of the legislature not to create a personal duty on behalf of employees.

Plaintiffs had informed the district judge, when they sought to amend their suit to add the store manager as a defendant whose presence would destroy diversity of citizenship between the plaintiffs and defendants, that the Louisiana courts had only recently clarified Louisiana law to establish that a store manager may be held liable for a premises hazard under La.R.S. 9:2800.6. *See Holmes v. Great Atlantic & Pac. Tea Co.*, 587 So.2d 750 (La.App. 4 Cir. 1991), writ den., 592 So.2d 412 (La.1992). On appeal, the Court below wrote (Appendix A, p. A-3, *post*):

> Hernandez seeks to justify her delay in seeking the amendment by claiming that a Louisiana appellate decision clarified the law in this area, allowing her to sue the manager. *See Holmes v. Great Atlantic & Pac. Tea Co., [supra].* We find this claim puzzling, as that decision states that the law on this point has been settled since 1973. *See id.* at 752.

That position was not puzzling to Louisiana practitioners, many of whom had construed Louisiana law in the same manner as had plaintiffs' counsel, including the defense counsel who continued to press that argument before the Fifth Circuit despite the contrary holding of the Louisiana Court of Appeal in *Holmes*. The respondents' argument in the Court below was almost identical to the rejected position of the merchant in *Holmes* (587 So.2d at 752):

> Bolling asserts that La.R.S. 9:2800.6(A) statutorily provides that the *exclusive* duty owed to a customer injured on the merchant's premises is owed by the merchant and not by the merchant's employees. Bolling contends that since the responsibilities of the employees are discussed only with respect to the evidentiary burden of the merchant, this infers a specific intention on the part of the legislature not to create a personal duty on the part of employees.
>
> This interpretation of R.S. 9:2800.6 is unfounded. Although Section A defines the duty owed by the merchant, the language of the statute in no way creates an *exclusive* remedy that preempts claims against the merchant's employees who may also be at fault.

The 1973 case to which the Fifth Circuit referred is *Canter v. Koehring Co.*, 283 So.2d 716 (La.1973), which

"specifically approve[d]," 283 So.2d at 722, a line of cases which established the following criteria for imposing individual liability upon an employee when the employer owed a duty to the injured person (283 So.2d at 721):

> 1. The principal or employer owes a duty of care to the third person (which in this sense includes a co-employee), breach of which has caused the damage for which recovery is sought.
>
> 2. This duty is delegated by the principal or employer to the defendant.
>
> 3. The defendant officer, agent, or employee has breached this duty through personal (as contrasted with technical or vicarious) fault. The breach occurs when the defendant has failed to discharge the obligation with the degree of care required by ordinary prudence under the same or similar circumstances -- whether such failure be due to malfeasance, misfeasance, or nonfeasance, including when the failure results from not acting upon actual knowledge of the risk to others as well as from a lack of ordinary care in discovering and avoiding such risk of harm which has resulted from the breach of the duty.
>
> 4, With regard to the personal (as contrasted with technical or vicarious) fault, personal liability cannot be imposed upon the officer, agent, or employee simply because of his general administrative responsibility for performance of some function of the

employment. **He must have a personal duty towards the injured plaintiff,** breach of which specifically has caused the plaintiff's damages. **If the defendant's general responsibility has been delegated with due care to some responsible subordinate or subordinates, he is not himself personally at fault and liable for the negligent performance of this responsibility,** unless he personally knows or personally should know of its non-performance or malperformance and has nevertheless failed to cure the risk of harm. (Emphasis added)

Based upon the view that §2800.6 imposed a duty upon the merchant but not the employees who did not cause the hazard, many federal courts in Louisiana have generally treated claims against store managers as a fraudulent joinder. *See, e.g., Elder v. Wal-Mart Stores, Inc.*, 751 F.Supp. 639 (E.D.La.1990); *Freeman v. Wal-Mart Stores, Inc.*, 775 F.Supp. 208, 209 n. 1 (W.D.La. 1991), to mention only the reported cases. There were also a number of unreported cases to the same effect. Under that interpretation of §2800.6, which the respondent continued to urge after the opposite holding was made by the Louisiana courts in *Holmes*, naming the

store manager (if his identity had even been known then) would have been met with a claim of fraudulent joinder. It was only after *Holmes* was decided and the Louisiana Supreme Court denied a petition for a writ of review that the liability of a store manager for violation of the duties imposed by La.R.S. 9:2800.6 upon his employer became clear and that the holding of *Canter v. Koehring Co., supra,* applied in a case brought under La.R.S. 9:2800.6. It was only then that plaintiffs were justified in seeking to amend their suit to make the non-diverse store manager a party defendant. Before trial they sought to do so but were denied that opportunity by the district court.[5]

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[5]Significantly, removal of a case from the State courts may be undertaken even during the trial, except in a criminal case, when the grounds for removal first become known at that stage of the proceedings. Consequently, it would be anomalous to deny a plaintiff an opportunity to amend his pleadings to require remand at that stage of the proceedings when discovery of the grounds for amendment and remand come to light only after the cutoff date imposed by the Court for amending the pleadings.

Although Rule 15(a), F.R.C.P., mandates that leave to amend a complaint "be freely given when justice so requires," this Court's holding in *Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962), has led to the understanding that "the grant or denial of an opportunity to amend is within the discretion of the District Court." In 1988, Congress provided in 28 U.S.C. §1447(e) for discretion on the part of federal district courts in removed cases to permit amendment of a suit to destroy diversity. In such cases where amendment was permitted, Congress required that a removed case be remanded to the State courts for further proceedings. 28 U.S.C. §1447(c, e). That required a departure from the long line of cases, typified by *Barney v. Latham,* 103 U.S. 205, 26 L.Ed. 514 (1881), which hold that removability and entitlement to a remand of removed proceedings are determined by the state of the pleadings at the time of removal. Once there was no longer complete

diversity between the plaintiffs and defendants, federal subject matter jurisdiction would have been lost.

In *Hensgens v. Deere & Co.*, 833 F.2d 1179 (5 Cir. 1987), *cert. den.*, 493 U.S. 851, 110 S.Ct. 150, 107 L.ed.2d 108 (1989), the Court held that it was not necessary that a party be indispensable before a diversity-destroying amendment may be allowed to cause remand of removed proceedings to State court. That Court held that proper parties may be brought in by amendment, even though the federal courts thereby lose jurisdiction over the controversy. The Court established certain criteria for the exercise by a district judge of the discretion to determine whether to permit such an amendment. Those criteria are (833 F.2d at 1182):

> the extent to which the purpose of the amendment is to defeat federal jurisdiction, whether plaintiff has been dilatory in asking for amendment, whether plaintiff will be significantly injured if amendment is not allowed, and any other factors bearing on the equities.

We respectfully submit that the *Hensgens* factor inquiring into the motive to defeat federal diversity jurisdiction is improper and inconsistent with this Court's holdings upon the related issue of fraudulent joinder which would prohibit removal in the first instance. The joinder of a resident defendant for the purpose of defeating removal jurisdiction is not improper where, by the settled law of the state in which the action is brought, the resident defendant is solidarily liable with the non-resident defendant(s). *Chicago, B. & Q. R. Co. v. Willard,* 220 U.S. 413, 31 S.Ct. 460, 55 L.Ed. 521 (1911); *Chicago, R.I. & P.R. Co. v. Schwyhart,* 227 U.S. 184, 33 S.Ct. 250, 57 L.Ed. 473 (1912); *Chicago, R.I. & P.R. Co. v. Whiteaker,* 239 U.S. 421, 36 S.Ct. 152, 60 L.Ed. 360 (1915). Thus, although it might have been petitioners' intention to provoke a remand by the joinder of the resident store manager, we submit that it was improper for that motivation to have been considered to

be grounds for denying his motion for leave to amend his pleadings and to remand this cause to the State courts from which it had been removed. As shown in the district court, *Holmes* was not decided until after the amendment cutoff date, hence it is contrary to justice to bar petitioners from amending their complaint on that basis. Petitioners were significantly injured in the deprivation of their choice of forum with its attendant benefit of appellate review of the facts and a predictable legal result. Since amendment must be freely allowed when it was in the interest of justice to permit it, and since the refusal to allow petitioner to amend and destroy the diversity jurisdiction of the trial court deprived petitioners of viable claims against the resident defendant store manager which were then countenanced under Louisiana law as construed in *Holmes*, the second *Hensgens* factor was clearly satisfied. The Trial Court abused its discretion when it refused to permit the

amendment of this suit which would have returned this case to the plaintiff's chosen forum.

This Court has never decided, especially since the 1988 amendments to 28 U.S.C. §1447, under what circumstances a diversity-destroying amendment should be permitted. The *Hensgens* test, which imposes conditions which are contrary to a plaintiff's rights with regard to the issue of removability in the first instance, should not be regarded as a proper test of when such an amendment should be allowed. This case presents a recurring issue which will plague federal litigation until it is resolved by this Honorable Court. This is thus a proper case in which to grant review upon a writ of certiorari. Rule 10.1(a, c), Supreme Court Rules.

2) **Refusal to instruct in accordance with Louisiana law**

Federal courts sitting in a case arising under diversity of citizenship jurisdiction or removal jurisdiction predicated upon the diversity of citizenship of the parties are

bound to follow the substantive law of the State in which the claim arose. *Hanna v. Plumer,* 380 U.S. 460, 465, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965). In determining whether an issue is controlled by State law, the inquiry is: "does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court?" *Hanna v. Plumer, supra,* 380 U.S. at 466, quoting *Guaranty Trust Co. v. York,* 326 U.S. 99, 109, 65 S.Ct. 1464, 89 L.Ed. 2079, 160 A.L.R. 1231 (1945).

In this case, the Court refused to instruct the jury, in accordance with *Housley v. Cerise,* 579 So.2d 973 (La.1991), that establishment of the issue of causation could be based upon proof of plaintiff's previously asymptomatic pre-existing condition, symptom onset immediately following the incident for which reparation is sought, and medical evidence that it was "reasonably

possible" for that mechanism of injury to have produced that result. Without such an instruction defining the burden of proof upon that issue, the jury was left to apply the ordinary preponderance of evidence standard without the benefit of this principle which relaxed the burden in the above described scenario. The jury held that K-Mart was liable for all of the plaintiff's injuries, damages and losses, but it awarded the plaintiff a pittance for the injuries she actually sustained. She had suffered for several months with a lumbar sprain. She had required substantial orthopedic surgery to relieve the symptoms precipitated by the slip at the defendant's store which activated a previously asymptomatic condition. That surgery entailed not only a procedure in the site of the injury but another to remove a segment of bone to use as a bone graft in the area of the primary surgery. For all of that, the jury awarded only $10,000 in general damages.

The refusal to properly instruct the jury in accordance with Louisiana decisions significantly affected the result of this case, not on the issue of liability but the issue of quantum. The only reasonable explanation for the low award made by the jury in this case, especially when compared with comparable cases in State court, was that the jury compromised on the issue of damages in order to reach a consensus on the issue of liability. The trial court denied petitioners' right to a fair trial when it refused to properly instruct the jury. The Court below thus sanctioned an impermissible departure from controlling law which calls for this Court's intervention and correction to produce a just result. Such a basis for the exercise of this Court's jurisdiction is found in Rule 10.1(a), Supreme Court Rules.

3) **Exclusion of Relevant Expert Opinion**

This is a slip and fall case involving a clear, viscous substance spilled upon a mottled green tile floor.

Plaintiffs sought to call a safety expert and a physicist to establish the unreasonably dangerous nature of the condition which caused Mrs. Hernandez to slip and twist her ankle and back. The defendants, at a pre-trial conference, informed the Court that it intended to file a motion *in limine* to suppress that expert testimony. The trial court subsequently ruled that plaintiffs' expert witnesses' testimony was inadmissible because the subject upon which they would testify was obviously correct. The safety experts were proffered to testify regarding a number of things: the dangerousness of such a condition, the unlikelihood a customer would have seen and avoided the hazard while shopping, the attractiveness to children of the packaging of the product, the placement of the product within reach of small children, and the ease with which such children could open the bottles and spill their contents upon the tile floor, thus creating a high risk of the hazard encountered

by Mrs. Hernandez. The physicist was proffered to testify regarding the scientific principles relative to slipperiness of the substance and its hazardous nature in combination with the coefficient of friction of the tile floor on which the viscous substance was deposited. That testimony had a tendency to make the existence of some facts, and the non-existence of some others, that were of consequence to the determination of the store's fault and the absence of fault of the victim more probable or less probable, respectively, than could be shown without the evidence. Rule 401, F.R.Evid. Thus, the evidence was "relevant." *Ibid.*

The evidence tended to show that the presence of the liquid on the floor presented an unreasonably dangerous hazard which should not have been permitted to remain undiscovered in a merchant's store, especially in the area where there were numerous products of that nature placed on shelves for sale to customers, any one

or more of which could have been defective and leaking or opened by a customer and leaking upon the floor. Such expert evidence also tended to show that a shopper would not have been comparatively negligent if her activities diverted her attention from the floor and the substance was not an obvious hazard. As previously noted, the federal courts sitting in diversity must apply Louisiana law. In the instant case, the Fifth Circuit clearly failed to do so when it failed to follow the Louisiana Supreme Court's decision in *Perez v. Wal-Mart Stores, Inc.*, 608 So.2d 1006 (La.1992), which held that a store customer should not be held liable for any comparative fault at all unless there is some kind of large or *clearly visible* obstruction or spill on the floor of the store. As the evidence showed in this case, there was no such spill. The bubble bath was a clear liquid upon a green tile floor which was difficult to see in the absence of an inspection for such substances. It is clear

under Louisiana law that a customer of a store does not have to undertake such an inspection in order to avoid being held contributorily negligent. *See, e.g., Peralta v. Schwegmann Bros. Giant Supermarkets, Inc.*, 406 So.2d 720 (La.App. 4 Cir. 1981), *writ den.*, 410 So.2d 762 (La.1982). Moreover, Louisiana courts have consistently held that a store customer had no fault in failing to see a clear liquid on a store floor. *See, e.g., Bergeron v. K-Mart Corp.*, 540 So.2d 406 (La.App. 1 Cir. 1989); *Cash v. Charter Marketing Co.*, 607 So.2d 1036 (La.App. 3 Cir. 1992); *Bonnette v. K-Mart, Inc.*, 502 So.2d 202 (La.App. 3 Cir. 1987).

The Court excluded the evidence on the basis that the conclusions were obvious and did not require scientific evidence. That the testimony went to an ultimate conclusion of fact may not be a basis for excluding the evidence. Rule 704, F.R.Evid.

This Court, in the recent case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, ___ U.S. ____, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), set forth guidelines for determining when expert testimony is admissible under Rule 702, F.R.Evid. In that case this Court held that (113 S.Ct. at 2797):

> The inquiry envisioned by Rule 702 is, we emphasize, a flexible one. Its overarching subject is the scientific validity -- and thus the evidentiary relevance and reliability -- of the principles that underlie a proposed submission. The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.

The trial court in this case focused upon the conclusions, rather than the principles and methodology, and excluded relevant evidence that would have assisted the trier of fact in its determination of the issue of Mrs. Hernandez's contributory negligence. Such evidence is offered routinely in cases tried in Louisiana courts. Louisiana has adopted a Code of Evidence which substantially follows the Federal Rules of Evidence.

This Court, in *Daubert, supra,* 113 S.Ct. at 2798, held that exclusion of relevant evidence was inappropriate. This Court indicated that the method of dealing with such evidence was, instead (*ibid.*):

> Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence. *See Rock v. Arkansas,* 483 U.S. 44, 61, 107 S.Ct. 2704, 97 L. Ed.2d 37 (1987).

The decisions of the courts below are inconsistent with this Court's holding in *Daubert.* Therefore, this is an appropriate case for summary reversal and remand for a new trial. *See* Rule 10.1(c), Supreme Court Rules.

(4) **Denial of loss of consortium claim**

Under Louisiana law, there are several components to a claim for loss of consortium: (1) loss of love and affection, (2) society and companionship, (3) sexual relations, (4) the right of performance of marital services, (5) the right of support from a spouse, (6) aid and assistance, and (7) loss of felicity. *Warner v. Great*

Atlantic & Pac. Tea Co., 583 So.2d 61, 65 (La.App. 2 Cir. 1991). Proof of any of these elements is sufficient for an award of loss of consortium. *Ibid.; Finley v. Bass*, 478 So.2d 608 (La.App. 2 Cir. 1985). In the instant case, the jury made no award for Mr. Hernandez's loss of consortium, even though he established several of the elements stated above and his and his wife's testimony was not contradicted by the defendants. The Court of Appeals, upon review of this issue, appeared to conclude that the plaintiff's testimony concerning the frequency of sexual relations before his wife's injury somehow made the entirety of his testimony suspect. The evidence which was offered at trial on this issue did not suggest otherwise than that Mrs. Hernandez sustained an injury (the jury compensated her for it) and that her injury was painful and caused her to miss work (the jury compensated her for both of those). Under Louisiana law, there was no basis for refusing to award Mr.

Hernandez a reasonable amount as compensation for his losses attributable to the proven injury of his wife.

No reasonable jury could have concluded that the plaintiff did not prove his claim for loss of consortium under Louisiana law. Thus, the refusal to grant plaintiff either a new trial or to render a judgment *non obstante veredicto* in his favor on the issue of liability and order a new trial on the issue of damages was an abuse of discretion which denied plaintiff a fair trial.

No decision of this Court has decided when a federal court must step in to prevent a miscarriage of justice such as this one when the uncontradicted evidence clearly establishes a party's claim and there is no competent evidence to refute it. Therefore, this is also an appropriate case in which this Court should exercise its supervisory jurisdiction. Rule 10.1(a), Supreme Court Rules.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari and review the judgment and opinion of the Court below, following which it should vacate the judgments below and remand this cause for a new trial on the issue of damages and the comparative fault of the plaintiff.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have caused a copy of the foregoing to be served upon opposing counsel, by United States Mail, first class postage prepaid, by mailing a copy thereof to Rodney A. Seydel, *Esq.*, Attorney for K-Mart Corporation, at the following address this 23rd day of September, 1993:

Rodney A. Seydel, *Esq.*
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650 Poydras Street
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Tel.: [504] 523-1385

JOHN E. RUIZ, JR.
Attorney at Law

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-3478

TONI DECOSSAF HERNANDEZ,

Petitioner

versus

K-MART CORPORATION, *et al.*,

Respondent

Appeal from the United States District Court
for the Eastern District of Louisiana

(CA-90-2180 "I")

Before WISDOM, DAVIS, and SMITH, Circuit Judges.

PER CURIAM:*

This slip and fall case arose on July 26, 1989, when Toni Hernandez slipped in a small puddle of bubble bath or shampoo in a Chalmette, Louisiana K-Mart store. Hernandez' husband caught her before she fell, but the slip injured her back and aggravated a dormant cyst in her ankle. After a three-day trial, the jury awarded damages of $31,916.58. After reviewing the briefs and record, we conclude that no error occurred and affirm the judgment.

I.

The district court established August 2, 1991, as the deadline for amending the complaint. On December 30, 1991, eight days before trial, Hernandez sought to

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*Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

join the K-mart manager as an additional defendant -- a joinder that would have destroyed diversity of citizenship and deprived the district court of jurisdiction. We review the district court's denial of Hernandez's motion for abuse of discretion. *Daves v. Payless Cashways, Inc.*, 661 F.2d 1022, 1024 (5 Cir. Unit A Nov. 1981).

The district court did not abuse its discretion. Hernandez seeks to justify her delay in seeking the amendment by claiming that a Louisiana appellate decision clarified the law in this area, allowing her to sue the manager. *See Holmes v. Great Atlantic & Pac. Tea Co.*, 587 So.2d 750 (La.App. 4 Cir. 1991), *writ den.*, 592 So.2d 412 (La.1992). We find this claim puzzling, as that decision states that the law on this point has been settled since 1973. *See id.* at 752.

Simply because a court had held that joinder was improper in another case involving this K-Mart, does not mean that the law was confused. Rather, the court in

the other case applied the settled law and concluded that no liability could be imposed under that standard. Even if the law were incorrectly applied in that other case, Hernandez had no excuse for not attempting to join the manager earlier.

II.

Next, Hernandez argues that the district court erred by failing to grant her motion for judgment as a matter or law or for a new trial on the ground that the evidence does not support a finding of comparative negligence. The jury found Hernandez twenty-five percent at fault. We must affirm the verdict unless the evidence points so overwhelmingly in favor of one party that a reasonable jury could not have arrived at the verdict. *Boeing Co. v. Shipman,* 411 F.2d 365, 374 (5 Cir. 1969) (*en banc*).

Hernandez calls our attention to *Doming v. K-Mart Corp.*, 540 So.2d 400, 405 (La.App. 1 Cir. 1989),

affirming the trial court's granting of a judgment notwithstanding the verdict on the issue of comparative negligence. The trial court reduced the jury finding of forty percent negligence to five percent. Here, however, the record presents adequate evidence to support the verdict. Hernandez had shopped at this store many times and was familiar with the store's layout. She testified that at the time of the accident, she was looking straight ahead, rather than down, and was not looking at displays or merchandise. A reasonable jury could find negligence from these facts.[1]

III.

Hernandez also argues that the jury verdict undercompensated her for pain and suffering and

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[1] We reject Hernandez's argument that the district court abused its discretion in excluding the testimony of her safety experts. The testimony offered by the experts related to matters within the common knowledge of typical people, thereby obviating the need for expert analysis. *Peters v. Five Star Marine Serv.*, 598 F.2d 448, 449 (5 Cir. 1990) (*per curiam*).

disregarded evidence of her loss of earnings. We will not disturb a jury finding on damages unless it is entirely disproportionate to the injury sustained. *Calderera v. Eastern Airlines*, 705 F.2d 778, 784 (5 Cir. 1983). We do not believe that the award for pain and suffering was so disproportionate as to justify a new trial, as the award was approximately half as large as the damages for medical expenses. This award is especially justified, as Hernandez admitted on cross-examination that she had reinjured her ankle when she fell off of her crutches. Given that she had previously denied this injury, the jury had reason to question her veracity.

Likewise, we cannot conclude that the jury's award for loss of earnings was unreasonable. Hernandez worked for her mother's accounting firm and testified that she had missed thirty-nine weeks of work because of the accident. Hernandez's mother testified, without documentation, that just prior to the accident she had

decided to increase Hernandez's workload and responsibilities substantially. We think a reasonable jury could view this testimony with some skepticism. As a result, we cannot disturb the jury's findings.

IV.

Finally, Hernandez asserts that the jury erred by failing to award damages for loss of consortium.[2] Hernandez's husband testified that he had sexual relations with his wife once or twice per day, every day before the accident, and that this dwindled to about once per month after the accident. He testified that Hernandez was bedridden for four months, yet she never told her doctor. Given the frequency of pre-accident sexual relations alleged by Hernandez, the jury rightly could

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[2] K-Mart Corporation argues that we do not have jurisdiction over the loss of consortium claim because Hernandez's husband is not listed as a party on the notice of appeal. Although the notice of appeal uses the phrase "*et al.*," we previously have held that "*et al.*" suffices to provide notice where there are only two parties. *Morales v. Pan Am. Life Ins. Co.*, 914 F.2d 83, 85 (5 Cir. 1990).

view his claim with some skepticism. When combined with the overall questionable nature of testimony on other issues, the jury reasonably could choose not to believe Mr. Hernandez's testimony.

The judgment of the district court is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

MINUTE ENTRY
JANUARY 3, 1992
MENTZ, J.

TONI DECOSSAS HERNANDEZ, ET AL CIVIL ACTION

VERSUS NO. 90-2180

KMART CORPORATION SECTION "I" (1)

Before the court is the plaintiff Toni Hernandez's Motion to Amend Complaint and to Remand to State Court. After reviewing the motion, memoranda of counsel, the record, and the law, the court denies the motion.

The plaintiff seeks to amend the complaint and add two non-diverse defendants, and to have the case remanded to state court. In determining whether to allow the amendment, the court must carefully balance the equities. *Hensgens v. Deere & Co.*, 833 F.2d 1179,

1182 (5 Cir. 1987). In this case, the court finds that the equities weigh in favor of denying the amendment.

First, the court notes that the deadline for amendments to the complaint was August 2, 1991. Plaintiff asserts that she recently discovered the state court decision, *Holmes v. Great Atlantic & Pacific Tea Co.*, 587 So.2d 750 (4 Cir. 1991), which provides for a cause of action against the store manager. However, this recent case does not explain the plaintiff's failure to join K-Mart #3387, a Louisiana corporation, as a defendant. The plaintiff asserts that she is still attempting to find out the extent to which K-Mart #3387 is involved in the subject K-Mart store. The time for discovery has already ceased, and there is no excuse for failing to join this non-diverse defendant prior to the eve of trial.

Second, that this case has already been continued twice upon motion of the plaintiff. At the pre-trial conference, the plaintiff indicated that she might file a

motion to remand based upon the jurisdictional amount. The court indicated that it did not think such a motion would be successful, but that the court would consider such a motion if the parties could present appropriate authority therefor. Instead, the plaintiff has filed a motion to remand on different grounds. The court finds that the interests of justice require that this case proceed to trial.

The court does not find that the plaintiff will be *significantly* injured by denial of the amendment. While it will deprive the plaintiff of a possible claim against the store manager, the plaintiff still has a claim against the K-Mart Corporation. When weighed against the prejudice to the defendants of yet another delay, the court finds that amendment is unwarranted.

Finally, the plaintiff has not provided the court with an amended complaint which would allow removal. The amended complaint attached to plaintiff's motion has a

state court caption, thus the plaintiff has not even presented an amended complaint which applies to this action.

The plaintiff has had ample opportunity to amend the complaint, and the court finds that it would be inappropriate to amend the complaint and remand the case on the eve of trial. The court denies the motion.

Accordingly,

IT IS ORDERED that the plaintiff Toni Hernandez's Motion to Amend Complaint and to Remand to State Court is DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

TONI DECOSSAS HERNANDEZ, ET AL CIVIL ACTION

VERSUS NO. 90-2180

KMART CORPORATION SECTION "I" (1)

ORDER AND REASONS

Mentz, J.

Before the Court is the Motion for Judgment as a Matter of Law, or for Judgment Notwithstanding the Verdict, or Alternatively for a New Trial, filed by the plaintiffs, Toni Decossas Hernandez and Sherman Hernandez. Finding that the jury verdict and judgment in this matter are well-supported by the evidence and the law, the Court DENIES the motion.

The plaintiffs' claims arise from injuries sustained by Toni Hernandez when she slipped on some Sesame Street Bubble Bath which was on the floor at the K-Mart

store in Chalmette, Louisiana. This matter was tried in January, 1992, and the jury returned a verdict in favor of the plaintiffs. Damages were awarded of $20,916.58 for past medicals, $10,000 pain and suffering, $1,000 past wage loss, and no damages for future medicals, future loss of wages, or Sherman Hernandez's loss of consortium. In addition, the jury assigned 25% contributory negligence to the plaintiff, Toni Hernandez.

The plaintiffs complain that a number of this Court's evidentiary rulings, and some allegedly inflammatory remarks by defense counsel, caused the jury to improperly assess contributory negligence against the plaintiff, Toni Hernandez, and to award low amounts in damages. The plaintiffs ask this Court either to grant judgment as a matter of law reversing the jury's determination that Toni was contributorily negligent, or to grant a new trial. The Court notes that many of plaintiffs' complaints contained in this motion cannot be remedied

by this Court with a judgment as a matter of law. The Court cannot assess particular amounts of damages or percentages of fault, as these are findings of *fact* not matters of *law*.

Rule 50(a) of the Federal Rules of Civil Procedure provides:

> (1) If during a trial by jury a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against that party on any claim * * * which cannot under the controlling law be maintained without a favorable finding on that issue.
>
> (2) Motions for judgment as a matter of law may be made at any time before the submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

Pursuant to Rule 50(b), a party who has made a motion for judgment as a matter of law which was not granted may renew such motion by filing and service not later than ten days after the entry of the judgment.

The plaintiffs' argument regarding the jury's finding of contributory negligence appears to be that if the plaintiffs had been allowed to present their safety experts and rebuttal witness regarding K-Mart's liability, the jury would have come to a different conclusion. The crux of this argument is not that *based upon the evidence presented at trial* the plaintiffs are legally entitled to a judgment that Toni Hernandez was not contributorily negligent, but that, *if other evidence was presented at trial,* the jury would have found that Toni Hernandez was not contributorily negligent. The plaintiffs' burden under Rule 50(a)(1), however, is to demonstrate that there is "no legally sufficient evidentiary basis" for a reasonable jury to find that Toni Hernandez was contributorily negligent." This the plaintiffs have not done; they have relied upon "facts" which were excluded from evidence rather than the facts in evidence. The Court finds that the jury's verdict that Toni Hernandez was 25% contribu-

torily negligent was supported by the evidence at trial. A Motion for Judgment as a Matter of Law is an inappropriate vehicle for challenging a Court's evidentiary rulings.

The plaintiffs have moved in the alternative for a new trial pursuant to Rule 59 of the Federal Rules of Civil Procedure. A new trial may be granted under Rule 59 if "the verdict is against the great weight of the evidence, the damages awarded are excessive, the trial was unfair, or prejudicial error was committed in its course." *Smith v. Transworld Drilling Co.*, 773 F.2d 610, 613 (5 Cir. 1985) (footnotes omitted). The plaintiffs' argument in favor of the motion for new trial is that a number of the Court's rulings either rendered the proceedings unfair, or amounted to prejudicial error.

The plaintiffs complain of the following: (1) the Court's order prohibiting the testimony of plaintiffs' safety experts; (2) the Court's order prohibiting plaintiffs' expert,

Wilfred Gallardo, from testifying under Rule 406 of the Federal Rules of Evidence regarding his observations of unclean conditions at the K-Mart store on dates other than the date of the accident; (3) the Court's order prohibiting Teddy Lenaris from testifying as a rebuttal witness; (4) the defendant's failure to produce a sample floor tile, as per the Court's order of December 20, 1991; (5) defense counsel's allegedly inflammatory remarks during closing arguments on various other subjects, including Toni Hernandez's truthfulness about subsequent injuries, the extent of her loss of future earnings, and the loss of consortium claim; and (6) the Court's failure to give plaintiff's requested jury instruction regarding medical causation. The Court finds that none of these asserted "errors" rendered the proceedings unfair, or constituted prejudicial error.

First, the Court order prohibiting the testimony of plaintiff's safety experts was proper. This case involved

a slip on bubble bath; the jury needed no expert testimony in order to understand that bubble bath is slippery.[1] Expert testimony was also not necessary to help the jury understand that a clear liquid might be difficult to see given the color of the tile.[2] Finally, expert testimony is not necessary for the jury to understand and evaluate the clean-up procedures in place at the store. The plaintiffs further allege that the defendant's motion in limine should not have been granted because the defendants did not list it as a contemplated motion in the Pre-Trial Order. The Court's Minute Entry following the Pre-Trial Conference, however, indicates that the

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[1] The plaintiff's argument that an expert was necessary to explain to the jury that the tile surface had a low "coefficient of friction" is without merit; there was no dispute that the bubble bath on the floor caused the slip.

[2] The plaintiffs also complain of the defendant's failure to provide the plaintiffs with a sample tile. The Court finds that the failure to produce the tile did not amount to prejudicial error. The plaintiff produced photographs which demonstrated the color of the tile. The Court also notes that the plaintiffs did not at any time prior to trial attempt to compel production of the tile.

defendant informed the Court at the conference of its intent to file a motion to strike plaintiffs' expert's [*sic*].[3] Therefore, the plaintiffs' argument that the motion was untimely is wholly without merit.

Having been denied the opportunity to present the testimony of their experts, the plaintiffs sought to have their expert, Wilfred Gallardo, testify regarding his personal observations of conditions at the K-Mart. The plaintiffs sought such testimony pursuant to Rule 406 of the Federal Rules of Evidence as evidence of K-Mart's habit of failing to clean spills. Gallardo did not observe conditions in the store on the day of the accident, therefore the only relevance of his proposed testimony would have to be on the issue of habit. However, Gallardo's visits to the store were not sufficiently frequent as to be reliable evidence of habit, therefore, the

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[3] "The defendant contemplates filing a motion to strike plaintiff's expert witnesses. Such motion should be filed not later than December 30, 1991 at 5:00 p.m." *See* Minute Entry, December 23, 1991.

evidence was properly excluded.

The plaintiffs' complaint regarding the Court's refusal to allow Teddy Lenaris from testifying as a rebuttal witness is also without merit. The plaintiffs sought to use Lenaris as a rebuttal witness to testify that K-Mart employees did not actually follow the clean-up and safety practices which they testified to. Lenaris was not listed as a witness in the Pre-Trial Order. The Court's standard scheduling order requires that parties list all witnesses, except "rebuttal witnesses . . . when necessity cannot be reasonably be [*sic*] anticipated" for their use. Attorney's [*sic*] should be careful in failing to list a witness who is really part of their case-in-chief. *See Morgan v. Commercial Union*, 606 F.2d 554 (5 Cir. 1979). The Court disallowed Lenaris' testimony because he was really part of plaintiffs' case-in-chief. In addition, the Court does not agree with plaintiffs' argument that his use could not be reasonably anticipated. The

plaintiffs assert that the testimony of the K-Mart employees far exceeded their deposition testimony with respect to clean-up practices at the store. The Court notes, for example, that Brenda Doucet testified in her deposition regarding clean-up training and practices numerous times. *See* Plaintiffs' Memorandum in Support, Ex. B, pp. 12, 18, 20, 35-36, 41. Where the issue at trial was the reasonableness of K-Mart's clean-up practices, the plaintiffs would have been remiss if they had not anticipated that the store employees would testify that they were always on the look out for unsafe conditions.

The Court also notes that the testimony of the expert witnesses and Lenaris would have been relevant only to the issue of K-Mart's liability, an issue which the jury determined in the plaintiffs' favor. The plaintiffs go on to argue that because this evidence was not presented regarding liability, the jury rendered a verdict on damages which was too low. The plaintiffs here confuse

the issues of liability and damages. The burden is on the plaintiffs to prove the amount of their damages caused by the accident.[4] Once the jury determined that K-Mart was liable for the accident, the issue of damages is a separate inquiry. The plaintiffs have not pointed out in this motion, any specific evidence, which was presented to the jury, which would warrant a larger award for damages.

As to plaintiffs' complaints regarding allegedly inflammatory statements made in closing arguments, the Court points out that such statements were just that --

---

[4] The plaintiffs also argue that because the Court did not give their requested instruction on medical causation, *see Housley v. Cerise*, 579 So.2d 973 (La. 1991), the jury award for pain and suffering was too low, and the jury failed to award damages for future medicals. The plaintiffs do not cite, however, what evidence would have supported an award of future medicals. The Court finds that from the evidence presented at trial, the jury could easily concluded [*sic*] that Toni Hernandez would incur no future medical expenses as a result of her accident at K-Mart. The damage awards in this case result, not from improper rulings by the Court, but from a failure of the plaintiffs to present sufficient evidence to warrant a greater award.

argument. The Court properly instructed the jury that statements made by counsel are not evidence, and that the jury is free to disregard the arguments of counsel. It is certainly proper for counsel, during argument, to point out any inconsistencies in the testimony. The Court does not find that any of the alleged statements in the closing arguments was [*sic*] unduly prejudicial.

For the foregoing reasons, the Court finds that a new trial in this matter is unwarranted.

Accordingly,

IT IS ORDERED that

(1) the Motion for Judgment as a Matter of Law, or for Judgment Notwithstanding the Verdict, or Alternatively for a New Trial filed by plaintiffs Toni Decossas Hernandez and Sherman Hernandez is DENIED; and

(2) the hearing on the motion set for April 22, 1992 is CANCELED.

[Dated and signed by the Trial Judge on 4/13/92].

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-3478

TONI DECOSSAF HERNANDEZ,

Petitioner

versus

K-MART CORPORATION, *et al.*,

Respondent

Appeal from the United States District Court
for the Eastern District of Louisiana

ON PETITION FOR REHEARING

(June 25, 1993)

Before WISDOM, DAVIS, and SMITH, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

J. Smith
United States Circuit Judge

APPENDIX E

EXCERPTS OF STATUTES AND RULES INVOLVED

Section 1332(a)(1) of Title 28 of the United States Code provides:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between--
>
> (1) citizens of different States;
>
> * * * * *

Section 1441(a) of Title 28 of the United States Code provides:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

Subsections (c) and (e) of 28 U.S.C. §1447 provide:

> (c) A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such action.
>
> * * * * *
>
> (e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

Rule 701, Federal Rules of Evidence, provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Rule 702, Federal Rules of Evidence, provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 15(a), Federal Rules of Civil Procedure, provides:

> (a) **Amendments.** A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise, a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

Section 2800.6 of Title 9 of the Louisiana Revised Statutes of 1950, as amended, provided at the time relevant to this action:

A. A merchant owes a duty to persons who use his premises to exercise reasonable care to keep his aisles, passageways, and floors in a reasonably safe condition. This duty includes a reasonable effort to keep the premises free of any hazardous conditions which reasonably might give rise to damage.

B. In a suit for damages by a person who has suffered damages as a result of a hazardous condition while on the merchant's premises, the person must prove that the accident was caused by a hazardous condition. The burden of proof then shifts to the merchant to prove that he acted in a reasonably prudent manner in exercising the duty of care he owed to the person to keep the premises free of any hazardous conditions.

C. In exculpating himself from liability under this Subsection, the merchant need not introduce the testimony of every employee of the merchant or any particular proportion thereof, but is only required to introduce the testimony of any employee shown to have actually created the hazardous condition and those employees and management personnel whose job responsibilities included inspection or clean-up of the area where the accident giving rise to the damages occurred.

D. "Merchant" means one whose business is to sell goods, foods, wares, or merchandise at a fixed place of business. (Added by Acts 1988, No. 714, §1)

No. 93-526

OCT 29 1993

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

TONI DECOSSAF HERNANDEZ,

Petitioner,

versus

KMART CORPORATION, ET AL.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether this Honorable Court should exercise its discretionary power of supervision where the district court appropriately denied petitioner's Motion for Leave to Amend Complaint, filed one week before trial, where plaintiff relied on a recent Louisiana appellate court decision that failed to extend, modify, or reverse the settled Louisiana jurisprudence?

2. Whether this Honorable Court should address an issue regarding the trial court's refusal to instruct the jury regarding causation when the petitioner failed to bring such issue before the United States Court of Appeals for the Fifth Circuit and failed to object at the time of the trial to such refusal, especially when the jury held that Kmart was liable for all of plaintiff's injuries, even those injuries arising from a pre-existing condition?

3. Whether the trial court appropriately excluded the testimony of petitioner's experts when such anticipated testimony fell within the realm of the common knowledge of the jury and no such expert testimony was needed for the jury to appropriately determine the comparative negligence/ fault of the parties under Louisiana law?

4. Whether the trial court was manifestly erroneous in denying post-verdict relief for petitioner Hernandez's loss of consortium claim?

LIST OF ALL PARTIES TO THE PROCEEDING

Respondent agrees with the parties set forth in the Petition for Writ of Certiorari. However, because the trial court correctly denied petitioner's Motion to Amend Complaint and name as parties Kmart No. 3387, Inc., and John Galloway, the store manager, such parties have no interest in this Court's decision.

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No. 93-526

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

TONI DECOSSAF HERNANDEZ,

Petitioner,

versus

KMART CORPORATION, ET AL.,

Respondent.

RESPONSE BRIEF FOR PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondent respectfully requests that this Honorable Court deny petitioners' request that a Writ of Certiorari be granted to review the decision of the United States Fifth Circuit Court of Appeals in the instant case rendered on May 19, 1993.

OPINIONS BELOW

Respondent adopts petitioners' opinions below, and accordingly, will employ petitioners' appendixes regarding such opinions in this brief. However, in Appendix A, petitioners erroneously set forth the case number in the United States Court of Appeals for the Fifth Circuit as No. 92-3478. The correct case number is No. 92-3475.

JURISDICTION

Petitioner correctly seeks jurisdiction under 28 U.S.C. § 1254(1) through a Writ of Certiorari to this Court.

STATUES AND RULES INVOLVED

In addition to the statutes and rules that petitioners set forth in Appendix E, respondent sets forth in Supplemental Appendix A, Rule 16(b)(1), 50(a)(1), and 51 of the Federal Rules of Civil Procedure and United States Supreme Court Rule 10.1.

STATEMENT OF THE CASE

The Statement of the Case provided by the Petition for Writ of Certiorari is erroneous and inaccurate in several respects and incorrectly contains substantive arguments. Respondent will identify the inaccuracies in the order in which they appear and provide additional facts of the case on which respondent relies.

On July 26, 1989, plaintiff, Toni Hernandez, slipped in a small puddle of Sesame Street bubble bath or shampoo located in the health and beauty aids section of the Kmart store on Judge Perez Drive in Chalmette, Louisiana. (Vol. I, R. 278). On this shopping trip, plaintiff Hernandez was accompanied by her husband, Sherman, and her two children, Benjamin and Scarlet. Id. Petitioners failed to indicate that prior to her fall, she was looking straight ahead. (Tr. Vol. 5, p. 78), and that the spill was easily discernable several feet ahead of her. (Tr. Vol. 5, p. 55). Furthermore, Hernandez did not actually fall to the floor; instead, her husband caught her by the arm. (Vol. I, R. 278). However, she sustained injury to her left ankle and back as a result of the twisting motion used to prevent her fall. (Tr. Vol. 5, p. 54).

An examination of the record reveals that petitioners cannot substantiate that the color of the Kmart floor made it difficult for a customer to see spills on the floor. Furthermore, petitioners' allegations that Kmart had no safety and cleaning procedures in place at the time of the incident are unsupported. Kmart had a constant and continual clean up procedure ongoing at the time of the slip in the instant case. (Tr. Vol. 5, pp. 14-17, 22-24, 36-37, and 40).

Petitioners erroneously characterize the testimony of Camille Hebert, a Kmart employee. Ms. Hebert did not witness Hernandez slip, but heard someone shout "someone could be hurt." (Vol. II, R. 370 and Tr. Vol. 5, p. 27). Then, Ms. Hebert observed the plaintiff walking to the back of the store with her husband, rubbing her hip area, without assistance, and without limping. (Tr. Vol. 5, pp. 37-38). Although Ms. Hebert did not see the

substance on the floor before Hernandez's fall, that fact does not prove that Kmart failed to instruct its employees to inspect the aisles for such hazards.

Further, petitioners fail to substantiate the alleged testimony of Dr. McLachlan and Dr. Moss by reference to the record. In contrast to petitioners' allegations, respondent submits that the testimony of it orthopaedic surgeon revealed that the slip at Kmart did not cause the cyst located on Hernandez's left ankle to become active and symptomatic. (Tr. Vol. 4, pp. 183, 195, and 212).

Respondent further submits that petitioners' version of the action of the trial court below is incomplete, and therefore, inaccurate. On May 10, 1990, plaintiff, Toni Hernandez, filed a Petition for Damages in the Thirty-Fourth Judicial District Court for the Parish of St. Bernard, State of Louisiana. (Vol. I, R. 278-80). Subsequently, defendant Kmart, a non-citizen of Louisiana, successfully removed this suit to the United States District Court for the Eastern District of Louisiana based on diversity jurisdiction under 28 U.S.C. § 1332(A)(1). (See Vol. I, R. 273-75).

A preliminary conference was held before Judge Henry A. Mentz on July 8, 1991. At that time, the court set a deadline of August 2, 1991, for the filing of any amendments in the instant case. (Vol. I, R. 62). A pre-trial conference was subsequently held on December 20, 1991, where the plaintiffs failed to discuss their intention to file a Motion to Amend Complaint to add two non-diverse defendants. (See Vol. I, p. 28). Furthermore, in the Pre-Trial Order, plaintiffs' contested issues of fact failed to allege that John Galloway, the Kmart store manager, had a personal duty towards store customers. (Vol. I, R. 32). Furthermore, on December 23, 1991, at a pre-trial conference, petitioners only sought leave of the court

to file a Motion to Remand on the basis that petitioners' claim no longer met the requisite amount in controversy for diversity jurisdiction. (Vol. I, R. 26).

Instead of filing such motion, petitioners filed a Motion to Amend Complaint and Remand to the State Court on December 30, 1991, nearly five months after the scheduled deadline of August 2, 1991, and only one week prior to trial, seeking to add two non-diverse defendants, John Galloway, the store manager, and a Louisiana corporation, Kmart No. 3387, Inc. (Vol. I, R. 1, 3-6, 7-9). However, in a minut entry on January 3, 1992, the district court denied such motion, and trial proceeded on January 6, 1992. (Vol. II, R. 617-18).

As the record indicates, petitioners failed to seek leave of the court to file such amendment as required by the Rule 50(a)(1) of the Federal Rules of Civil Procedure, and further failed to file such petition with the district court. (Vol. I, R. 1). Instead, the Petition was attached to the Motion to Amend Complaint. (Vol. I, R. 7-9). Additionally, plaintiffs' Supplemental and Amending Petition indicated that such Petition was being filed with the Thirty-Fourth Judicial District Court for the Parish of St. Bernard, State of Louisiana, rather than the United States District Court for the Eastern District of Louisiana. (Vol. I, R. 7).

Regarding the trial court's denial of plaintiff's Motion for Leave to Amend, petitioners correctly state that the trial court denied such motion on the ground that plaintiff sought such amendment beyond the expiration delays provided by the district court's Rule 16 Scheduling Order. However, plaintiffs erroneously state that after the deadline for such amendments, the Louisiana Supreme Court decided the viability of a state law claim against a store manager. Such statement misinforms this Court because the case to

which the plaintiffs refer, Holmes v. Great Atl. & Pac. Tea Co., 587 So. 2d 750 (La. App. 4th Cir. 1991), writ denied, 592 So. 2d 412 (La. 1992), is a Louisiana Fourth Circuit Courts of Appeal decision, not a Louisiana Supreme Court case. Instead, a 1973 Louisiana Supreme Court case, Canter v. Koehring Co., 283 So. 2d 716 (La. 1973), decided years before the expiration date for amending a petition in the instant case, allowed such an action against a store manager if the injured customer alleged that the store manager breached a personal duty toward the store customer. Additionally, petitioners fail to substantiate the contention that the identity of the true owner of Kmart in Chalmette, Louisiana, was not discoverable until close to the trial date.

Regarding the trial court's refusal to instruct the jury according to the language cited from Housley v. Cerise, 579 So. 2d 973 (La. 1991), as suggested by Plaintiffs' Requested Jury Charge No. 47, (Vol. II, R. 475), the trial court submitted its own instructions regarding pre-existing injuries and causation of injuries. (See Vol. II, R. 571). Furthermore, this issue should not be before this Court because petitioners fail to appeal this issue to the United States Fifth Circuit Court of Appeals (see Petitioners' Brief to the Fifth Circuit), and as required, petitioners fail to timely object to the trial judge's refusal to issue such instruction. (Vol. II, R. 578).

Regarding the condition of the cyst, the petitioners contend that Toni Hernandez's cyst was asymptomatic before the accident. However, such conclusion is not substantiated by reference to the record. Furthermore, besides the petitioner's own testimony, nothing in the record indicates that the cyst became symptomatic concurrently with the twisting motion made by plaintiff Hernandez to prevent her fall.

Regarding the trial court's refusal to allow petitioners' expert to testify that close inspection was required for the small, clear puddle of the bubble bath or soap to be seen, petitioners erroneously suggest that the court imputed to plaintiff Hernandez knowledge of the existence of a hazard that she should have discovered. Instead, Louisiana law places a burden on a pedestrian to see if his path is clear and exercise ordinary care to see obstructions in his pathway. (Bergeron v. Kmart, 540 So. 2d 406, 408 (La. App. 1st Cir. 1989) (citing Dunaway v. Rester Refrigeration Serv., Inc., 428 So. 2d 1064 (La. App. 1st Cir.), writs denied, 433 So. 2d 1056, 1057 (La. 1983)). However, in a self-service store, a patron is burdened with a diminished duty to see what should have been seen because his attention is presumed to be on the display shelves. Kavlich v. Kramer, 315 So. 2d 282, 284 (La. 1975). However, the record indicates that plaintiff was looking straight ahead, not at the display shelf, when her slip occurred. (Tr. Vol. 5, p. 78). Furthermore, such experts could not offer testimony that was beyond the jury's realm of common knowledge. (See Defendant's Memorandum in Support of Motion in Limine to Exclude Expert Testimony -Vol. II, R. 589-93).

Petitioners state that the evidence was uncontradicted that Mr. and Mrs. Hernandez had frequent sexual relations and that such sexual relations diminished upon Mrs. Hernandez's injury. Such evidence came only from the plaintiffs' testimony, and although it may have been uncontradicted, the trial court had the opportunity to witness the plaintiffs' demeanor and made a determination on the merits of this claim. Coco v. Winston Indus., Inc., 341 So. 2d 332, 334-35 (La. 1976).

SUMMARY OF THE ARGUMENT

Petitioners present four questions to this Court claiming that the issues contained therein merit this Court's exercise of its discretionary review of appellate decisions. However, none of the four issues contain the special and important reasons warranting judicial discretion by the United States Supreme Court as exemplified in Supreme Court Rule 10.1. Specifically, no appellate circuits conflict on any of the four issues, a federal question is not involved, the accepted and usual course of judicial proceedings have been followed, no two state courts of last resort are in conflict on such issues, such issues do not involve federal law questions that should be settled by this Court, and the decision of the United States Fifth Circuit Court of Appeal does not conflict with the Louisiana state court of last resort, the Louisiana Supreme Court. Although the listing contained in Supreme Court Rule 10.1 is not exclusive, the issues brought by the petitioner are not extraordinary and sufficiently important to deserve this Court's attention.

In addition to the questions presented not being worthy of this Court's discretionary review under Supreme Court Rule 10.1, this Petition should be denied for the following reasons:

(1) The recent decision of Holmes v. Great Atl. & Pac. Tea Co., 587 So. 2d 750 (La. App. 4th Cir. 1991), writ denied, 592 So. 2d 412 (La. 1992), does not provide a res nova cause of action nor does such case extend, clarify, or modify the cause of action allowed by the 1973 Louisiana Supreme Court decision in Canter v. Koehring Co., 283 So. 2d 716 (La. 1973). Therefore, petitioner has no justifiable excuse

for her delay in filing her Motion to Amend Complaint, and thus, the district court properly denied such motion under the authority of Rules 15 and 16(b)(1) of the Federal Rules of Civil Procedure by exercising its discretion in managing its docket by the timely disposition of matters before the court.

(2) Petitioner failed to timely object to the district court judge's refusal to administer the Housley jury charge regarding cau sation of damages, and failed to bring such issue for review to the United States Court of Appeals for the Fifth Circuit; thus, such issue is improperly before this Court.

(3) The district court appropriately excluded the opinions of petitioners' experts because their anticipated testimony fit within the realm of the jury's common knowledge and would not assist the jury in their determination of the comparative fault of the parties.

(4) The trial court properly denied petitioners' Motion for New Trial on her loss of consortium claim because the jury did not abuse its discretion in denying such award.

ARGUMENT

I. The Lower Court Properly Denied Plaintiffs' Motion to Amend to Add Non-Diverse Parties Because Such Denial Was In Compliance With The Law of Louisiana's Highest Court and Followed the Dictate of Rules 15 and 16 of the Federal Rules of Civil Procedure.

The instant case was properly removed to federal court under the authority of 28 U.S.C. § 1441(a) because the original parties were citizens of different states; therefore, diversity jurisdiction was appropriate under 28 U.S.C. § 1332(A)(1). On the eve of trial, petitioners filed a Motion to Amend Complaint and to Remand to State Court by attempting to join two non-diverse defendants and destroy diversity subject matter jurisdiction. According to 28 U.S.C. § 1447(e), when a plaintiff seeks to join such additional non-diverse defendants, "the court may deny joinder, or permit joinder and remand action to the State court." 28 U.S.C. § 1447(e) (1988). Hence, the court has discretion in denying or permitting such joinder. However, addition of a non-diverse party defeats subject matter jurisdiction. Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 378 (1978).

In the instant case, the district court decided that the joinder of additional parties did not satisfy the requirements Rule 15 of the Federal Rules of Civil Procedure and was untimely according to the Rule 16(b)(1) schedule deadline for such amendments. (See App. E (Rule 15) and Supp. App. A (Rule 16(b)(1)). If a party does not amend before a responsive pleading is served, then the party may only amend through leave of the court or by written consent of an adverse party, and such leave "shall be freely given when justice so requires." FED. R. CIV. P. 15(a).

In Hensgens v. Deere & Co., 833 F.2d 1179 (5th Cir. 1987), the United States Fifth Circuit Court of Appeals outlined several factors that a court should employ in determining whether leave to amend should be granted. The court should consider: (1) the extent to which the purpose of the amendment is to defeat jurisdiction; (2) whether plaintiff has been dilatory in seeking such amendment; (3) whether plaintiff will be significantly injured or prejudiced if the amendment is not granted; and (4) any other factors bearing on fairness and equity. Id. at 1182. Furthermore, "the court should consider judicial economy and whether the amendments will lead to expeditious disposition of the merits of the litigation." Chitimacha Tribe v. Harry L. Laws Co., 690 F.2d 1157, 1163 (5th Cir. 1982).

Regarding the Hensgens factors, the trial court properly decided that such factors weighed in favor of denying petitioners' amendment. First, respondent asserts that petitioners had ample time to seek leave of court to amend prior to the eve of the trial. Although mere passage of time does not mandate denial of a motion to amend, delay becomes fatal at some point. Gregory v. Mitchell, 634 F.2d 199, 203 (5th Cir. 1981). Therefore, when such delay occurs, the mover has to prove the delay was due to excusable neglect. Daves v. Payless Cashways, Inc., 661 F.2d 1022, 1025 (5th Cir. 1981). In the instant case, August 2, 1991, served as the scheduled deadline for filing all amendments. However, petitioner did not submit the amendment in question until December 30, 1991, one week before the scheduled trial of January 6, 1992. Such "eve of trial" amendments are generally disfavored by the court. Prudhomme v. Teneco Oil Co., 955 F.2d 390, 393 (5th Cir. 1992).

Furthermore, Rule 16(b)(1) of the Federal Rules of Civil Procedure mandates that the judge:

> shall, after consulting with the attorneys for the parties in any unrepresented parties, by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time (1) to join other parties and to amend the pleadings; ...

FED. R. CIV. P. 16(b)(1) (emphasis added).

Therefore, Rule 16 provides the district court judge with the power to enforce the date set by such scheduling conference. Moreover, a federal district court has broad discretion over the management of its docket and has the ability to timely enforce the disposition of matters before such court. Prudhomme, 955 F.2d at 392.

Petitioners contend that the delay in filing a Motion to Amend to add two non-diverse defendants was not motivated to fraudulently join such parties and defeat diversity jurisdiction but was excusable because of the recent Louisiana Fourth Circuit Courts of Appeal decision in Holmes v. Great Atl. & Pac. Tea Co., 587 So. 2d 750 (La. App. 4th Cir. 1991), writ denied, 592 So. 2d 412 (La. 1992). However, Holmes that decision did not create a new cause of action or clarify an action against a store manager in a Louisiana state court as petitioner alleges. Instead, such an action was viable under the 1973 decision of the Louisiana Supreme Court in Canter v. Koehring Co., 283 So. 2d 716, 722 (La. 1973).

In Canter, the Louisiana Supreme Court held that if an officer, agent, or employee of a corporation breaches a personal duty toward the injured plaintiff, breach of which specifically has caused the plaintiff damages, then personal liability can be imposed on such officer, agent, or employee. 283 So. 2d at 722. However, adopting the reasoning set forth

in Adams v. Fidelity & Cas. Co., 107 So. 2d 496 (La. App. 1st Cir. 1958), "such personal liability cannot be imposed upon the officer, agent, or employee simply because of his general administrative responsibility for performance of some function of the employment." Canter, 283 So. 2d at 721. In fact, in Canter, the court found that one of the construction engineers was not personally negligent because the plaintiff could not prove that this engineer committed an affirmative act; for example, delegating his responsibility to an incompetent subordinate, aiding the subordinate in the negligent act, and knowing of a subordinate's breach of duty and failing to act within a reasonable time to repair such breach. Id. at 727. Hence, Canter requires an affirmative act on the part of the employee to impose a breach of a personal duty.

Therefore, since 1973, in Louisiana, plaintiffs in slip and fall accidents had the ability to sue a store manager by employing the requirements of Canter that the employee must breach a personal duty. Canter allowed such action generally against any employee, officer, or agent of a corporation. 283 So. 2d at 722. Holmes merely approved of such action in the specific context of a store manager. 587 So. 2d at 752-53. Therefore, Holmes confirmed the cause of action that Canter permitted years ago. Hence, prior to August 2, 1991, the expiration date for the filing of all amendments in the instant case, petitioners could have relied on Canter to allege specific affirmative acts that indicated a breach of personal duty by the store manager, John Galloway, as the plaintiff eventually did in her untimely amendment, and such action would have been granted.

However, petitioners erroneously relied on Holmes for establishing a cause of action against the store manager, but Holmes is only significant in that prior to that decision, the petitions of other plaintiffs failed to allege breach of

any personal duty by the store manager. See Elder v. Wal-Mart Stores, Inc., 751 F. Supp. 639, 641 (E.D. La. 1990), and Lailhengue v. Mobile Oil Corp., 775 F. Supp. 908, 910 (E.D. La. 1991). Instead, the plaintiffs in such cases generally alleged that the employees involved were personally liable as a result of their duties as employees of the company, not for a breach of a personal duty. See id. However, Canter mandated that a personal duty must be owed and breached to the plaintiff. 283 So. 2d at 727. Finally, the plaintiffs in Holmes, 587 So. 2d at 752-53, and Freeman v. Wal-Mart Stores, Inc., 775 F. Supp. 208, 210 (W.D. La. 1991), following the mandate of Canter, specifically and appropriately alleged that the store managers breached a personal duty against them, and thus, the respective courts granted such actions.

Therefore, based on the holding of Canter alone, if petitioners in the instant case had named the store manager in the original Petition, alleging that such manager breached a personal duty, as the plaintiffs did in Holmes and Freeman, then the cause of action against the store manager would have been both timely and viable. However, petitioners misinform this Honorable Court by stating Holmes creates or clarifies Louisiana law. Since Canter, Louisiana law has always permitted such a cause of action against a store manager if the petitioner alleged that the store manager breached a personal duty. Because petitioner's reliance on Holmes is meritless and is not excusable neglect, the lower courts properly denied the Motion to Amend, ruling that plaintiffs fraudulently joined such non-diverse defendants.

Furthermore, "until such time as the case is no longer sub judice, the duty rests upon federal courts to apply state law under the Rules of Decision statute in accordance with the then controlling decision of the highest state

court." Huddleston v. Dwyer, 322 U.S. 232, 236 (1944) (per curiam) (quoting Vanderbark v. Owens-Illinois Co., 311 U.S. 538, 543 (1941)). In Louisiana, Canter serves as the controlling decision of the highest state court, the Louisiana Supreme Court, on the issue of a personal action against an employee of a corporation. Holmes did not modify, extend, or clarify Canter. Therefore, no conflict exists between the decision rendered by the United States Court of Appeals for the Fifth Circuit in the instant case and Canter. Hence, under Supreme Court Rule 10.1, petitioners' first issue does not merit review by this Honorable Court.

II. Petitioners Lost the Right to Appeal to this Court the District Court's Failure to Include a Jury Charge Because Petitioners Failed to Timely Object and Bring Such Issue Before the Appellate Court.

Petitioners' question presented regarding the district court's denial of a fair trial because of its refusal to give plaintiffs' requested jury charge on causation of damages should also fail because such issue was not properly preserved for review by this Court. Rule 51 of the Federal Rules of Civil Procedure mandates that any proposed jury charge by a party that is not administered by the court cannot be assigned as an error "unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." FED. R. CIV. P. 51. In the instant case, No. 47 of Plaintiffs' Second Set of Supplemental Jury Charges submits the following proposed instruction, relying on Housley v. Cerise, 579 So. 2d 973 (La. 1991).

> You may presume that Mrs. Hernandez's injury resulted in her slip in Kmart if you are satisfied that before the accident she was in good health, but following the accident the symptoms of her disabling condition appeared and continuously manifested themselves afterwards providing that

> the medical evidence showed that there was a reasonable possibility of casual connection between the accident and the disability condition.

(Vol. II, R. 475).

However, the district court elected not to instruct the jury as plaintiffs requested. Instead, Judge Mentz instructed the jury in the following manner:

> In assessing damages you may consider only the suffering and other damages directly caused by the accident. The Defendant is not responsible for suffering or other damages caused by ailments which existed before the accident. However, the Defendant takes the Plaintiff as he finds him - and if the defendant's negligence results in aggravation of a latent previous condition - then the Defendant is liable for such aggravation of the preexisting condition - and is not granted immunity from liability because of a greater susceptibility to injury on the part of a Plaintiff with a preexisting condition. The Plaintiff, however, is not entitled to damages resulting from the normal course of a preexisting condition.

(Vol. II, R. 571).

However, an examination of the trial record reveals that plaintiff failed to make any objection to the district court judge's failure to administer charge No. 47 of Plaintiffs' Second Set of Supplemental Jury Charges. In addition, on page 578 of the record, no notation regarding plaintiffs' objection to the failure to administer this charge was recorded on things done outside the jury's presence. (See Vol. II, R. 578). Hence, because of the failure to object before the jury retired, plaintiffs have waived their privilege to submit as an error the failure of the district court judge to administer such jury charge. Although petitioners in their request for new trial presented the trial court's failure to provide the requested jury instruction regarding medical causation as a reason for granting a new trial (Vol. II, R. 297), such

allegation does not rise to satisfy the requirement of Rule 51 that the party's objection to the trial court's failure to administer a jury instruction be made prior to the time that the jury retires. Furthermore, plaintiff failed to preserve this error for review of this Court by not addressing such issue in the brief to the United States Fifth Circuit Court of Appeals. (See Petitioners' Brief to Fifth Circuit).

Because petitioners failed to properly object to the court's failure to administer the Housley jury charge, plaintiffs' related contentions of error stemming from such refusal are also warrantless. Hence, plaintiffs' request to this Court for review on the issue of quantum must fall. Furthermore, "before a court of appeal can disturb an award made by a trial court[,] the record must clearly reveal that the trier of fact abused his discretion in making his award." Perniciaro v. Brinch, 384 So. 2d 392, 395 (La. 1980) (citing CoCo v. Winston Indus., Inc., 341 So. 2d 332, 334-35 (La. 1977)). Petitioners fail to indicate how the trier of fact abused its discretion in awarding $10,000 in general damages to the plaintiff. Petitioners' only arguments regarding quantum stem from the district court judge's refusal to properly instruct the jury, which is not properly before this Court. Therefore, this Court should not exercise its discretionary jurisdiction under Supreme Court Rule 10.1(a) to address this issue.

III. The District Court Properly Excluded the Testimony of Petitioners' Experts In Accordance With FRE 702 and Daubert.

The district court's grant of defendant's Motion in Limine to exclude the expert testimony of Wilford Gallardo and Dennis Howard, safety experts, and Gordon Goldman, a physicist, is not an issue worthy of this Court's review under Supreme Court Rule 10.1(c). Supreme Court Rule 10.1(c) provides that when a state court or a federal appellate court "has decided a federal question in a way that conflicts with applicable decisions of this court," this Court's jurisdiction should be exercised. Petitioners suggest that the trial court's refusal to allow the

testimony of these three individuals is in conflict with this Court's recent decision in Daubert v. Merrill Dow Pharmaceuticals, Inc., 113 S. Ct. 2786 (1993). However, respondent contends that no such conflict exists and that such issue does not merit review by this Court.

Rule 702 of the Federal Rules of Evidence allows testimony by experts:

> [i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise.

FED. R. EVID. 702 (emphasis added). Respondent submits that the anticipated testimony of petitioner's experts in the instant case does not satisfy the requirement of Rule 702 of the Federal Rules of Evidence that such testimony enhance the jury's understanding in determining comparative fault.

When the trial judge decided on defendant's Motion in Limine, the mandate regarding such expert testimony was set forth by the United States Fifth Circuit Court of Appeals, the controlling jurisdiction, in Peters v. Five Star Marine Serv., 898 F.2d 48 (5th Cir. 1990). In Peters, the district court judge, Judge Adrian Duplantier, refused to allow the testimony of a maritime operations expert regarding the cleanliness of the ship's deck and the proper stowage of cargo because the subject matter of such expert was within the realm of the type of things that ordinary people, such as those present on a jury, could determine by using their common sense. 898 F.2d at 449. The Fifth Circuit affirmed Judge Duplantier's decision in preventing the plaintiff's

expert testimony, stating "that the jury could adeptly assess the situation using only their common experience and knowledge. Expert testimony was unnecessary, and thus the decision to exclude the testimony was within the [broad] discretion of the trial judge." Id. at 450.

As defendant suggested in its Motion for Limine, plaintiffs' experts, Gallardo and Howard, failed to conduct special tests regarding the reasonableness of Kmart's clean up and inspection procedures; thus, the conclusions that were reached in such experts' reports were simply those that could be made by any citizen, based upon their common sense and knowledge. Therefore, respondent submits that the trial judge did not abuse his discretion in denying such testimony.

Regarding the anticipated testimony of plaintiffs' other expert, Gordon Goldman, a physicist, respondent further contends that such testimony invaded the province of the jury. At trial, defendant did not contest the fact that the substance found on Kmart's floor was slippery. Thus, Goldman's use of a "slip-o-meter" and his conduction of a coefficient of friction test has no relevance to the reasonableness of Kmart's inspection and clean up procedures. Furthermore, Goldman, in his report, admitted that the slipperiness of bubble bath or shampoo is a widely known fact. Hence, the testimony that could be provided by Goldman was within the realm of the common knowledge of the average person sitting on a jury. Because plaintiffs' proposed experts failed to offer any assistance to the members of the jury, the trial judge properly excluded such testimony.

Furthermore, petitioners erroneously contend that the district court's decision is in conflict with this Court's recent decision in Daubert, regarding the proper standard for admission of expert testimony under the guidelines of Rule 702 of the Federal Rules of Evidence. First, petitioners fail to note that the true holding of Daubert was that the Frye test, the "general acceptance" test, was superseded by the adoption of the Federal Rules of Evidence. Daubert, 113 S. Ct. at 2793. That is, Rule 702 of the Federal Rules of Evidence does not require that the scientific technique employed by the proposed expert be "generally accepted" as reliable in the relevant scientific community. Id. at 2792, 2794.

However, this Court in Daubert did note that the expert's testimony must "assist the trier of fact to understand the evidence or determine a fact in issue." Id. at 2795. "Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful." Id. (quoting 3 **Weinstein & Berger**, ¶ 702[02], 702-18). Hence, an expert's testimony will fail the relevancy test under Rule 401 of the Federal Rules of Evidence if it does not assist the trier of fact to understand an issue. Therefore, the Daubert Court did not implicitly or explicitly overrule the Peters decision on which the district court judge in the instant case relied.

Therefore, the district court's decision to exclude plaintiffs' proposed experts' testimony was not in direct conflict with Daubert. Instead, such decision followed the mandate of Daubert, Peters, and Rule 702 of the Federal Rules of Evidence that an expert's testimony must assist the trier of fact in understanding the issue beyond the common knowledge of the jury. As aforementioned, in the instant case, the petitioners' proposed experts could not meet such standard. Therefore, such testimony was not needed to assist the jury in determining the comparative fault of the parties. Hence, because no conflict exists between the district court's decision and this

Court's in Daubert, this issue does not merit this Court's discretionary review.

Furthermore, manifest error must exist for a question of fact such as comparative fault to be disturbed on appeal. Towns v. Georgia Cas. & Sur. Co., 459 So. 2d 124 (La. App. 2d Cir. 1984). Pursuant to Rule 50(a)(1) of the Federal Rules of Civil Procedure, to succeed on a Judgment as a Matter of Law, the court must determine that "no legally sufficient evidentiary basis" is contained in the record to uphold the jury's verdict. FED. R. CIV. P. 50(a)(1). However, as the trial court noted in its Order and Reasons regarding plaintiff's Motion for Judgment as a Matter of Law, plaintiffs attempted to rely on evidence not deemed admissible at trial. The trial court found that sufficient admissible evidence existed that Hernandez was comparatively negligent by not seeing the puddle of liquid located in the middle of the aisle at Kmart.

At trial, plaintiff Toni Hernandez admitted that she was not looking at the displays and merchandise but looking straight ahead when the slip occurred. (Tr. Vol. 5, p. 78). Furthermore, plaintiff admitted that after the accident, she also noticed a puddle of liquid shampoo from a distance several feet in front of her, (Tr. Vol. 5, p. 55), thereby suggesting that if she had been paying adequate attention, she would have noticed the puddle that caused her slip. Because plaintiff's attention was not diverted to the display shelves, she is not entitled to the presumption that "a patron has a diminished duty to see that which should be seen because his attention is presumed to be attracted to the advertised goods on the shelves." Bergeron v. Kmart Corp., 540 So. 2d 406, 408 (La. App. 1st Cir.), writs denied, 544 So. 2d 408, 412 (La. 1989).

Respondent suggests that after a review of the admitted evidence, the trier of fact properly assigned twenty-five percent comparative negligence to the plaintiff. Therefore, because the testimony of plaintiffs' proposed experts was properly excluded and because plaintiff is not entitled to the diminished duty of a store customer because her attention was on her path, the comparative fault issue does not merit this Court's discretionary review.

IV. Denial of Loss of Consortium Claim Is Not An Abuse of Discretion.

Respondent submits that the trial court's denial of plaintiffs' loss of consortium claim does not merit exercise of this Court's supervisory jurisdiction under Supreme Court Rule 10.1(a). Petitioner must overcome several burdens in obtaining a reversal of such decision. First, to establish a loss of consortium claim, petitioners must prove one of the following elements by a preponderance of the evidence, the loss of: "(1) love and affection, (2) society and companionship, (3) sexual relations, (4) the right of performance and material services, (5) the right of support of husband, (6) aid and assistance, and (7) loss of felicity." Warner v. Great Atl. & Pac. Tea Co., 583 So. 2d 61, 66 (La. App. 2d Cir. 1991). Furthermore, a jury's assessment of damages will not be overturned unless an appellate court finds that the jury abused its wide discretion. Towns, 459 So. 2d at 126. Moreover, the reviewing court cannot substitute its subjective belief of the appropriate amount of damages for that of the trier of fact. Broussard v. Delchamps, Inc., 571 So. 2d 855, 860 (La. App. 3d Cir. 1990), writ denied, 575 So. 2d 370 (La. 1991). Finally, an appellate court cannot reverse the decision of a trier of fact involving evaluation of a witness' credibility and

demeanor unless such decision is manifestly erroneous. Coco v. Winston Indus., Inc., 341 So. 2d 332, 334-35 (La. 1976).

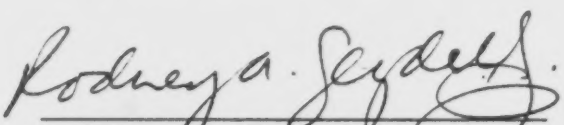
In the instant case, plaintiff's husband, Sherman Hernandez, testified that he had sexual relations with his wife once or twice a day, every single day. (Tr. Vol. 4, p. 63). Such self-serving testimony is insufficient in sustaining an award for loss of consortium. See Miller v. Mahfouz, 563 So. 2d 1223, 1226 (La. App. 1st Cir. 1990). Furthermore, plaintiff, Toni Hernandez, testified that she was bedridden for four months and unable to perform any chores or services in her home. (Tr. Vol. 4, p. 56). However, Dr. McLachlan, her treating orthopaedic surgeon, did not prescribe bedrest. (Tr. Vol. 4, p. 250). Thus, plaintiff Hernandez's testimony is not medically supported.

Because the plaintiffs failed to support a claim for loss of consortium by a preponderance of the evidence, the jury's award cannot be disturbed, and thus, no miscarriage of justice resulted. Hence, the jury's failure to award damages for loss of consortium is not worthy of this Court's supervisory jurisdiction.

CONCLUSION

For the aforementioned reasons, this Honorable Court should deny petitioners' Writ of Certiorari and deny review of all questions presented in such Petition. Furthermore, respondent respectfully submits that this Court should uphold the judgment of the courts below and deny petitioners' request for remand for a new trial.

Respectfully submitted,



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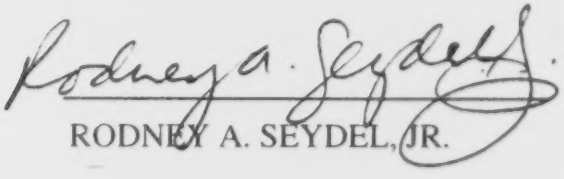
CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served upon all counsel of record herein by United States mail, first class postage prepaid, by mailing a copy thereof, to John E. Ruiz, Jr., Esq., attorney for plaintiff, at the following address, this 29th day of October, 1993:

John E. Ruiz, Jr., Esq.
P. O. Box 791180
New Orleans, Louisiana 70179-1180



RODNEY A. SEYDEL, JR.

SUPPLEMENTAL APPENDIX A

EXCERPTS OF STATUTES AND RULES INVOLVED

Rule 16(b)(1) of the Federal Rules of Civil Procedure provides:

(b) Except in categories of actions exempted by district court rule as inappropriate, the judge, or a magistrate when authorized by district court rule, shall, after consulting with the attorneys for the parties and any unrepresented parties, by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time

(1) to join other parties and to amend the pleadings;

. . . .

Rule 50(a)(1) of the Federal Rules of Civil Procedure provides:

(a)(1) If during a trial by jury a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against that party on any claim, counterclaim, cross-claim, or third party claim that cannot under the controlling law be maintained without a favorable finding on that issue.

. . . .

Rule 51 of the Federal Rules of Civil Procedure provides:

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court, at its election, may instruct the jury before or

after argument, or both. No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

. . . .

Rule 10.1 of the Rules of the Supreme Court provides:

1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
>
> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question n a way that conflicts with applicable decisions of this Court.